Associated Milk Producers, Inc. *and* **Donald L. Brower** *and* **L. D. McDaniel.** Cases 16-CA-9163 and 16-CA-9406

January 13, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 13, 1981, Administrative Law Judge Richard J. Linton issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in support of the Decision of the Administrative Law Judge.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

1. At the hearing, during the rebuttal stage of the proceeding, Donald Brower testified on behalf of the General Counsel concerning a conversation he had with Supervisor Foster just prior to the union election in 1979:

> THE WITNESS [Brower]: I had talked to him [Foster]—or was talking to him before the union election, and we was talking about Dean Cinnamon and L. D. McDaniel and Jessie Smith and a couple of others that was batting heavy for the Union.
>
> And I made the remark that it was a damn shame that people like that had to be around, because I was nonunion, I was for the company and I was out there doing what I could for the company
>
> And he told me not to worry about it. He said, "I'll get rid of the fat bastards any time I want to."
>
> He said, "He'll make a slip . . . an error or something, and I'll get him."

At another point in his testimony Brower recounted another preelection conversation with Foster concerning McDaniel:

> THE WITNESS [Brower]: I didn't like L. D. [McDaniel], and I told J. D. [Foster] I didn't like him. I was going to whip his ass the first chance I got.
>
> And he said, "Well, when you whip him, make sure that I don't see it," he said, "then I won't have to do nothing about it."
>
> And he said, "I wish you would whip him, as a matter of fact." He said, "I'd like to see somebody whip him."

Respondent moved to strike the foregoing testimony as prejudicial, since the evidence should have been offered during the General Counsel's case-in-chief. Citing *Acute Systems, Ltd. d/b/a McDonald's*, 214 NLRB 879, 881 (1974), the Administrative Law Judge sustained Respondent's motion. The General Counsel has excepted to this ruling, and we find merit in his exception.

An administrative law judge has the discretion to exclude evidence improperly introduced on rebuttal, but his discretion should not be exercised to the detriment of a party's rights. In *McDonald's, supra*, the Administrative Law Judge declined to keep the record open to receive evidence that should have been subpenaed and introduced during the General Counsel's case-in-chief. She specifically observed, however, that the result reached in her Decision would not have been altered had the excluded evidence been considered. In the case before us, on the other hand, the Administrative Law Judge was at some pains to point out that the excluded evidence would have constituted strong support for the General Counsel's theory that L. D. McDaniel had been unlawfully discharged. In the absence of the excluded evidence, the Administrative Law Judge concluded that the General Counsel had failed to establish a *prima facie* case. Thus, it is clear that the excluded evidence was not only relevant but crucial to an informed legal assessment of Respondent's reasons for the discharge and therefore to the protection of McDaniel's statutory rights.

Under those circumstances, the preferable course would have been to admit the evidence, and we do so now.[1] We are aware, however, that the evidence was introduced at a stage in the proceeding that made it difficult for Respondent to counter effectively, assuming that it could have done so. Further, by sustaining Respondent's motion to strike, the Administrative Law Judge relieved Respondent of the responsibility of introducing its own evidence concerning the conversations between Foster and Brower. Respondent, of course, would be far more severely prejudiced by the lack of opportunity to present evidence to contradict Brower in this respect were we prepared to find, on the basis of the previously excluded testimony, that McDaniel was discriminatorily discharged in violation of Section 8(a)(3) of the Act. Under those circumstances, we would consider a remand necessary to permit

[1] We credit Brower's testimony based on the fact that the Administrative Law Judge found him to be a generally credible witness.

Respondent to introduce further evidence on the matter. As discussed at length in this Decision, however, we have upheld the Administrative Law Judge's conclusion that the discharge of McDaniel was lawful.

2. The Administrative Law Judge found that Donald Brower was discharged for failing to conform to a valid work rule and concluded that his termination therefore did not constitute a violation of the Act. The General Counsel has excepted to this conclusion, and we agree with the General Counsel that Brower was first laid off and then discharged by Respondent in retaliation for his having expressed prounion sympathies and having complained about his wages.

The record establishes that, during the 1979 organizing campaign conducted at Respondent's facility by Teamsters Local 47, Brower, a new employee, was openly and vociferously opposed to the Union. The Union was defeated in an election held on November 2, 1979.[2]

Sometime in early 1980[3] Brower began to change his mind about the advisability of union representation at his employer's facility. His conversion was completed and his prounion attitude fixed when he learned from Supervisor Foster in March or April that over-the-road drivers would soon be paid an hourly wage instead of the mileage rates they had been receiving.[4] Brower's reaction to the information was to tell Foster that in the future he intended to support the Union.

About a month after Brower announced to Foster that he intended to campaign for the Union, Brower was sent to Respondent's El Paso terminal; while there he urged the El Paso drivers to support the Union and accused the Company, in frank and unflattering terms, of being unfair. El Paso Supervisor Smith learned of Brower's activities and telephoned Foster. When Brower returned from El Paso to Crowley, Foster told him to turn in his credit card, and that he was being placed on sick leave.[5] When Brower protested, Foster told him that he could not return to El Paso. Foster told Brower, "The management doesn't want you to come back to El Paso because you talk too much. You agitate."

The Administrative Law Judge found, and we agree, that Respondent laid off Donald Brower in retaliation for the remarks made to his fellow employees at El Paso, which were protected under the Act, and we therefore conclude that the layoff constituted a violation of Section 8(a)(3) and (1) of the Act. We shall order a remedy accordingly.

Brower was laid off on May 23. He made numerous calls to Foster during the layoff to inquire about returning to work and was eventually recalled as a route driver[6] on June 11. He was discharged on June 15, ostensibly for failing to report an accident.

There is no doubt that Brower did in fact have a minor accident while backing a tractor-trailer into a loading bay at Vandervoort's Dairy, but there is considerable question whether Brower was aware that he had scratched the vehicle. The damage consisted of a shallow scratch 10–12 inches long on the left rear fender of the trailer, caused when Brower scraped against the wall of the unloading bay as he was backing the vehicle down the ramp. Two witnesses, both of whom testified at the hearing, saw the accident, but neither mentioned it to Brower himself. Under all the circumstances, we find it entirely possible, and even probable, that Brower, engaged in the noisy and delicate task of backing a large tractor-trailer rig down into an enclosed loading bay, did not realize that the side of the truck had slightly scraped a post. Thus, although we agree with the Administrative Law Judge that Brower did damage the truck, we draw no adverse inferences from the fact that he denied having done so when Foster confronted him with his failure to file a report of the accident or from the fact that he maintained his denial at the unfair labor practice hearing. In this connection we observe further that Brower had in the past reported all accidents to his vehicle and that Respondent therefore had no reason to assume that he would deliberately have failed to do so in this instance.

Based on the foregoing, we agree with the Administrative Law Judge that the General Counsel established a *prima facie* case of unlawful discharge. We disagree, however, that Respondent introduced sufficient credible evidence to rebut the General Counsel's case and demonstrate that it would have terminated Brower even absent his union activities. Respondent argues that it fired Brower pursuant to a valid and written work rule that required its employees to report all damage to vehicles, however minor. Respondent's rule, however, did not mandate termination for violations of the rule. To the contrary, according to Respondent's "Driver's Manual," which contains an expla-

[2] That election was subsequently set aside and a new election ordered. *Associated Milk Producers, Inc.*, 255 NLRB 750 (1981).

[3] All dates are in 1980 hereafter unless otherwise indicated.

[4] The change in the wage structure reduced Brower's net income by almost 60 percent.

[5] The reference to medical leave was apparently Foster's peculiarly humorous response to Brower's remark that the Company's conduct made him sick.

[6] Brower had been an over-the-road driver prior to his layoff. The record is insufficient to enable us to determine whether Brower's June 11 recall was to a substantially equivalent position; therefore, insofar as such a determination is relevant to the issue of reinstatement and backpay, we leave it to the compliance stage of this proceeding.

nation of work rules and regulations, "Any driver failing to report an accident *could* be subject to immediate discharge."[7] Elsewhere the manual provides that "[f]ailure to report an accident is cause for immediate dismissal."[8] Nowhere does the handbook suggest that the discipline imposed for failure to report an accident is not discretionary with management.[9] Since the rule on its face is discretionary, the burden was upon Respondent to demonstrate that termination was the discipline uniformly imposed for violation of the rule. The evidence here suggests the contrary; when Brower asked Foster how many other employees had been fired for failing to report an accident, Foster replied, "None. But I'm firing you."

Moreover, Respondent's defense is undermined by its past practice of imposing disproportionately harsh punishment upon union activists for infractions of its rules. In a prior case involving Respondent, the Administrative Law Judge concluded, and the Board affirmed, that employee Charles Tingle was unlawfully discharged in retaliation for his union activities, noting that "[t]he apparent unreasonableness of the punishment here carries an inference that the asserted reason for the discharge was pretext."[10] Clearly, Respondent's method of ridding itself of union adherents was to seize upon the infraction of a rule to justify their discharges. In Brower's case, as we noted earlier, it is not even clear that the rule requiring an employee to report all accidents was, in any but the most literal sense, violated at all. We therefore find that Respondent has failed to rebut the General Counsel's *prima facie* case by showing that the discharge would have been made in the absence of Brower's protected activity and conclude that Donald Brower was discharged in violation of Section 8(a)(3) and (1) of the Act.

3. In concluding that Respondent's discharge of L. D. McDaniel did not constitute a violation of the Act, the Administrative Law Judge found that the General Counsel had not established a *prima facie* case of unlawful motivation. While we agree with the Administrative Law Judge that Respondent did not discharge McDaniel unlawfully, we find that the General Counsel did establish a *prima facie* case, which Respondent successfully rebutted.

L. D. McDaniel was a longstanding union activist, and there is no question that at the time of his discharge on September 30 Respondent was acutely aware of his union sympathies. In addition to his organizational efforts, McDaniel testified against Respondent at an unfair labor practice hearing, and Respondent was reminded of that fact shortly before McDaniel's discharge when, on September 9, Administrative Law Judge Anderson issued his Decision in that proceeding, finding Respondent in violation of the Act. Moreover, the record demonstrates that Respondent harbored animus toward the Union and its supporters. We have concluded that Respondent violated Section 8(a)(3) in the discriminatory layoff and discharge of Donald Brower; in addition, the conversations between Foster and Brower in 1979 indicate union animus directed specifically against McDaniel.[11] The elements of protected activity on the part of the discharged employee, employer knowledge of the protected activity, and employer animus toward the Union, taken together, are sufficient to establish a *prima facie* case of unlawful discharge. Certainly those elements are present here. We therefore find that the General Counsel established *prima facie* that D. McDaniel was discharged in retaliation for union activity.

Respondent argues that McDaniel and another employee, Forrest Cottrell, were fired for fighting on the job, not for union activity. The record establishes that Respondent maintains an unwritten rule against fighting and that McDaniel was aware of the rule. McDaniel testified that he would have expected to be fired had he been the aggressor in the fight.[12] There is no question that McDaniel did engage in a fistfight and did hit his opponent with a wrench in the course of the conflict. Moreover, Cottrell was also fired, and the General Counsel introduced no evidence that Cottrell was a union supporter or that he was fired in an attempt to legitimize the unlawful discharge of McDaniel. Thus, we find that Respondent maintained a legitimate

[7] Resp. Exh. 1 at p. 5.

[8] *Id.* at 12.

[9] The handbook also states:

> The heart of the Safe Driving Award Program is the careful determination of the preventability of each accident in which a driver is involved. This must be done in light of all the facts pertinent to the accident's occurrence. Unearthing of these facts is sometimes difficult in practice but it can be made easier by training drivers to report the accidents in which they are involved, completely and accurately.
>
> Complete investigation by management is equally necessary. In finding Brower's discharge legitimate, the Administrative Law Judge determined that termination was not a disproportionate discipline in light of the importance of the rule to Respondent's operation. To the extent that the Administrative Law Judge advanced reasons for Respondent's reporting rule other than that given by Respondent, we disavow his findings. Insofar as such justification may be necessary to rebut an inference of unlawful motive, the burden is upon Respondent, not upon the Administrative Law Judge, to advance reasons for its rules and to justify imposition of seemingly disproportionate discipline.

[10] *Associated Milk Producers, Inc., supra.*

[11] We find, however, that the probative value of these conversations is diminished by time, since they occurred nearly a year before McDaniel's termination.

[12] McDaniel testified that he struck the first blow but maintained that it was in self-defense, as Cottrell was approaching in a menacing fashion.

no-fighting rule which was evenly adminstered, and that McDaniel and Cottrell broke the rule and were terminated after an investigation of their conduct. We conclude that Respondent has introduced sufficient evidence to rebut the General Counsel's *prima facie* case of wrongful discharge. Accordingly, we conclude that the Administrative Law Judge properly dismissed that portion of the complaint alleging that the discharge of L. D. McDaniel violated Section 8(a)(3) of the Act.

THE REMEDY

Having found that Respondent laid off and discharged Donald Brower because of his union activities and sympathies in violation of Section 8(a)(3) and (1) of the Act, we shall order that Respondent cease and desist therefrom and take certain actions intended to effectuate the policies of the Act. We shall order Respondent to offer Donald Brower immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered as a result of the discrimination practiced against him, with backpay computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and with interest thereon computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[13]

CONCLUSIONS OF LAW

1. Associated Milk Producers, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Chauffeurs, Teamsters and Helpers Local 47, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.
3. By laying off and discharging Donald Brower in retaliation for his union activities and other protected activity, Respondent has violated Section 8(a)(3) and (1) of the Act.
4. The aforesaid violations are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Associated Milk Producers, Inc., Blue Mound, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Laying off employees as a result of their union activity.

(b) Discharging employees as a result of their union activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer Donald L. Brower immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered as a result of the discrimination against him, together with interest thereon, computed in the manner set forth in the section of this Decision and Order entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Blue Mound, Texas, facility copies of the attached notice marked "Appendix."[14] Copies of said notice, on forms provided by the Regional Director for Region 16, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 16, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint allegations not specifically found herein be, and they hereby are, dismissed.

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[13] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Member Jenkins would compute the interest due on backpay in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

[14] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

In recognition of these rights, we hereby notify our employees that:

WE WILL NOT lay off employees because of their union activities and sympathies.

WE WILL NOT discharge employees because of their union activities and sympathies.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL offer Donald L. Brower immediate and *full* reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings he may have suffered as a result of our discrimination against him, with interest.

ASSOCIATED MILK PRODUCERS, INC.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge: These consolidated cases were heard before me in Fort Worth, Texas, on January 8, 1981, pursuant to a consolidated complaint, dated November 6, 1980, issued by the General Counsel of the National Labor Relations Board through the Acting Regional Director for Region 16 of the Board. The consolidated complaint is based on charges filed by Donald L. Brower, an individual (Brower), and L. D. McDaniel, an individual (McDaniel), against Associated Milk Producers, Inc. (Respondent or AMPI herein).

In the consolidated complaint, the General Counsel alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended, herein called the Act, by unlawfully interrogating an employee around mid-March 1980; Section 8(a)(3) of the Act by laying off Brower on May 21, 1980, and discharging him on June 15, 1980; and Section 8(a)(3) and (4) of the Act by discharging McDaniel on September 30, 1980.[1]

By its answer, Respondent admits certain allegations, but denies that it has violated the Act in any manner.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for the General Counsel[2] and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Kansas corporation headquartered in San Antonio, Texas, operates as a distributor of dairy milk from various locations in Texas. Its former facility at Crowley, Texas, now located at Blue Mound, Texas, is the operation involved herein. During the past 12 months, Respondent had gross sales in excess of $500,000, and purchased and received at its Texas locations goods and services valued in excess of $50,000 directly from points located outside the State of Texas. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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[1] All dates shown are for 1980 unless otherwise indicated.

[2] I am constrained to observe that the General Counsel's brief contains certain gross inaccuracies. For example, at br. p. 4 the General Counsel states that El Paso location Supervisor Bob Smith was aware of Brower's "change of sentiments from supporting Respondent in the union organizational campaign to supporting the Union." Not only is none of the cited pages support for the assertion, but the following appears in the cross-examination of Smith by the General Counsel:

> Q. That you—when he was talking against the company and for the union—
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> A. He didn't say whether or not he was for the union at that time. *And I didn't say that.* [Emphasis supplied.]

At br. p. 7 the General Counsel asserts that Crowley Supervisor J. D. Foster "testified that he had never fired anyone before for fighting and *hired* an employee named Webber who was known to have been a frequent fighter while in the employ of Respondent. In *rebuttal*, the General Counsel's witness, Brower, testified that he had had a conversation with Foster in which Foster asked Brower to whip McDaniel but not to let Foster see it. The surface question related to whether Foster had rehired Webber, for Foster had become a supervisor after Webber had earlier left. During the General Counsel's cross-examination of Foster, the latter stated:

> Q. All right, sir. But you hired him [Webber] anyway?
>
> A. I didn't rehire him. He was hired up at the Sanger location and then later transferred, when we put the Crowley location together and the Blue Mound location together, I inherited that location up there.

With respect to the *rebuttal* testimony that Foster allegedly encouraged Brower to whip McDaniel, that evidence was *stricken* when I sustained Respondent's motion to strike on the basis that it was not proper rebuttal. At the General Counsel's request that the evidence be made an offer of proof, I granted such motion and rejected the offer. To the extent that the General Counsel's reference to this rejected evidence in his brief is an unarticulated motion that I reverse my ruling, I decline to do so and adhere to my rulings at the hearing.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that Chauffeurs, Teamsters, and Helpers Local 47, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union or Local 47 herein) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

1. Introduction

The principal issues involved in this consolidated case are whether Respondent laid off Donald L. Brower on May 21, 1980, and fired him on June 15 because of his support of Union (or, as Respondent asserts, for failing to report an accident), and whether it fired L. D. McDaniel on September 30 for the same reason (or, as Respondent asserts, for engaging in a fight with another driver) plus the additional reason that he testified against Respondent on April 22 before Administrative Law Judge Clifford H. Anderson in a Board proceeding.

At the time of their discharges by Respondent, Brower had been employed only since August 1979 as a transportation (over-the-road) driver, whereas McDaniel had been employed as a route (local pickup) driver for nearly 12 years.

Complaint paragraph 7 (in conjunction with par. 14) alleges that Respondent violated Section 8(a)(1) of the Act by Crowley Terminal Manager J. D. Foster's conduct, "since on or about mid March," of orally "interrogating one of its employees concerning such employee's union preferences and desires."

At the close of evidence, Respondent moved that I dismiss complaint paragraph 7 on the basis that no evidence was adduced in support of it. (the General Counsel opposed the motion.) I denied the motion then on the ground that a reading of the record might disclose some evidence in support of the allegation even though I could recall none. In his brief, counsel for the General Counsel "concedes that there is insufficient evidence to warrant a finding of oral interrogation as alleged in paragraph 7 . . . ." (Br. p. 2.) Although the General Counsel moves to withdraw the oral interrogation, he seeks to retain the generalized phrase of interference, restraint, and coercion in paragraph 7 for "derivative 8(1)" purposes. As complaint paragraph 14 (conclusionary 8(a)(1) allegation) may serve the derivative purpose, I now grant Respondent's motion to dismiss complaint paragraph 7 in its entirety on the ground there is no record evidence to support such allegation.

2. Administrative Law Judge Anderson's Decision

As Administrative Law Judge Clifford H. Anderson outlined in his September 9, 1980, Decision[3] involving Respondent's same facility,[4] an election was held among Respondent's approximately 34 Crowley employees on November 2, 1979. The Union, apparently losing the election, filed objections which were consolidated for hearing with a complaint which alleged, among other matters, that on October 20, 1979, Respondent discharged driver Charles Tingle because of his support of the Union. Among other unfair labor practice findings, Administrative Law Judge Anderson found that Tingle's discharge violated Section 8(a)(1) and (3) of the Act as alleged. As previously noted herein, because Administrative Law Judge Anderson's Decision is not final, I do not rely on his findings of animus or unfair labor practices by Respondent.

For background purposes only, I take note of certain factual matters recited in the Decision. Thus, I note that L. D. McDaniel[5] figured prominently as a union supporter and the General Counsel's witness in the case before Administrative Law Judge Anderson. The parties stipulated here that McDaniel was a card solicitor and that he testified in the prior case. Moreover, it appears McDaniel also served as the Union's election observer and attended the preelection conference. He testified against Respondent's interests at the April 22 hearing.

B. *Donald L. Brower's Layoff and Discharge*

1. Brower's layoff

It is undisputed that in the weeks between his August 1979 hiring and the November 2, 1979, election, Brower was outspoken against the Union. There is a dispute concerning whether Respondent became aware that Brower switched his position to support of the Union in the early spring of 1980. The subject matter of this question leads directly to Brower's layoff about May 23.

Crowley-Blue Mound terminal Manager J. D. Foster testified that on April 21, General Manager Sonny Pride told him in Arlington, Texas, that everyone would convert to an hourly pay basis and that he could give his employees 1 or 2 weeks notice.[6] Shortly after receiving this information, Foster told Brower (and presumably the other seven transportation drivers) that the pay conversion would be effective on May 4.

Brower testified that beginning around January-February he changed his position regarding the Union. According to Brower, around March or April 25 he learned from Foster that the transportation drivers were to be converted from a mileage to an hourly pay rate of $4.62. Brower protested, and informed Foster that he definitely

[3] As requested by the General Counsel at the instant hearing, I take official notice of Administrative Law Judge Anderson's Decision. As the Decision does not become final until adopted or modified by the Board, I do not rely here on the unfair labor practices found by Administrative Law Judge Anderson.

[4] At the time of the April 22, 1980, hearing before Administrative Law Judge Anderson in consolidated Cases 16-CA-8782 and 16-RC-8022, the facility was located in Crowley, Texas. Respondent moved its Crowley terminal to Blue Mound, Texas, around late May 1980. Crowley is a short distance south of Fort Worth, Texas, and Blue Mound is just north of Fort Worth. Thus, Respondent combined its Crowley and Blue Mound operations into a single terminal.

[5] One of the two alleged discriminatees herein.

[6] Route drivers, such as McDaniel, already were hourly paid. Transportation (over-the-road) drivers, such as Brower, were paid by the mile. Brower testified without contradiction that the pay change reduced his take-home pay by about 60 percent. Foster testified that as of on or about May 4 at the Crowley location there were some eight transportation drivers, 28 hourly paid route drivers, and 4 hourly paid mechanics.

would do everything "I could to campaign the union in and get a union in the next time we voted, that I wasn't going to try to swing it the other way for them after what he had done to us." He said Foster displayed a "go-to-hell" look or attitude indicating it did not matter to him. Foster apparently said nothing. In his testimony on this point, Brower added that Foster had said (at an earlier time, apparently) that he could get rid of anyone he wanted to, when he wanted to, union or not, whenever he felt like it.[7] Foster did not address the earlier conversation in his testimony, and denied speaking with Brower or any employee about the Union after the April hearing.[8]

About a month after Brower told Foster of his intentions to support Local 47, Brower had occasion to make a trip to Respondent's El Paso terminal. According to Brower, he urged the drivers there to support the Union because the drivers were not being paid as much as AMPI claimed they were; that Crowley drivers were not being paid for bunk time; and that the drivers should select Local 47 in the next vote and shut AMPI down until it treated the drivers fairly. He admittedly made the urging in language unflattering to Respondent, including cursing AMPI and Foster. He denied telling El Paso Location Supervisor (or Terminal Manager) Bob Smith that he was sick of Respondent copulating the drivers around, and denied calling Respondent a copulating "son-of-a-bitch" for treating him unfairly, and stated that he knew better than to do so because Smith repeats what he hears. He said he spoke with Smith only generally about the trip there.

El Paso Location Supervisor Smith testified that, on May 21, Brower came into his El Paso office. When Smith asked him how he was doing, Brower replied, in latrine terminology, that he was not worth "a scato." Brower reportedly said that AMPI wanted him to run for nothing and that AMPI was not worth a defecation. Brower then began to curse Foster and Sonny Pride, describing them as "god-damn" maternal fornicators.[9] Smith responded, "In other words, if anybody needs to know anything about AMPI, all they've got to do is ask you?" Brower replied in the affirmative.

Smith testified that a little while later he encountered Brower in the drivers' room where Brower told him he was going to write a letter to President Carter and let him know what a sorry company AMPI was. Smith did not describe what response, if any, he gave. He testified that he told the foreman to get Brower loaded as soon as possible. Smith then called Foster at Crowley, reported Brower's remarks, and stated that he did not want Brower sent to El Paso again. Smith testified that Brower said nothing about the Union on this occasion, and that the only time Brower had ever mentioned Local 47 to him was around April when he said he was "not for the union."

Brower testified that, on his return to Crowley, Terminal Manager Foster told him to turn in his credit card, that Foster was sending a new driver to El Paso, and that Brower was going on sick leave. When Brower protested that he was not sick, Foster stated that Brower had said he was sick and that he was being placed on sick leave. Brower turned over the credit card and went home.

Explaining the reference about being sick, Brower testified that he had told Foster he was sick of getting fornicated around by AMPI. Foster denied that Respondent was mistreating the drivers. According to Brower, Foster told him that he could not return to El Paso because:

> The management doesn't want you to come back to El Paso because you talk too much. You agitate.

Although it is not entirely clear from Brower's testimony that all of the foregoing occurred in the same conversation, it seems clear that he was describing either a single conversation or two conversations held close in time.[10]

Terminal Manager Foster testified that on May 23, 1980, he told Brower that he could not let him return to El Paso, and as Foster knew that Brower did not desire to drive a route there was no work for him since there was no transporting for Brower to do. Foster therefore told Brower to go home and wait, that perhaps something would develop. He testified that at the time, and for the previous 3 months, the only transporting being done was between Crowley and El Paso (some 600 miles west of Crowley). Foster denied that Brower ever told him he was going to campaign to get the Union in at AMPI, and, on cross-examination, denied knowing that Brower's sentiments had switched to support of the Union as of the May 1980 telephone report from El Paso terminal Manager Bob Smith.[11]

[7] According to Brower, until he changed his position on Local 47, Foster could freely discuss union issues with Brower. Thereafter, Foster would remark, "I don't want to talk about it" if Brower brought up the subject.

[8] Brower had a tendency to date admitted events at an earlier time than did Foster. Thus, while it is undisputed that Brower received a 1-week suspension for having an unauthorized person in his truck, Brower placed the date in December 1979 whereas Foster dated the event in February. While I credit Brower concerning the undisputed conversation reported above, it is likely the conversation occurred in late April after Foster had been told himself about the pay conversion by General Manager Pride.

[9] During his earlier cross-examination, Brower denied these assertions and testified that he did not know Pride. Pride's exact position in the corporate hierachy is unknown, notwithstanding Smith's testimony that Foster reports to Pride. Such fact is not at all clear from the pleadings or the record. In any event, Pride apparently did not have an office at Crowley. Thus, I note that Assistant Transportation Manager McAdams testified that his own office is located at the Dallas-Fort Worth Division's headquarters in Arlington. Brower did not clarify whether he meant that by not knowing Pride he had never heard that Sonny Pride was general manager (or a managerial superior of Foster). Respondent did not present any evidence showing that it informs drivers of the names and titles of management located away from the terminals where the drivers are assigned.

[10] Brower's testimony was presented in a rambling and confusing fashion at times.

[11] I credit Brower over Foster. Not only did the former testify in a more believable fashion, his story is more consistent with the undisputed facts, particularly in reference to the pay system change for the transportation drivers. Moreover, I note that on cross-examination Foster concedes that he became aware through gossip that Brower, who was "mad as a hornet," was no longer supporting AMPI against the Union.

2. Brower's discharge

Following his May 23 layoff, Brower testified that he telephoned Foster numerous times in an unsuccessful effort to obtain work. Finally, around June 11, he received a registered letter (not offered in evidence) from Foster advising him to report for work as a route driver picking up milk at farmers' dairies. Brower so reported and worked 3 days at $4.62 per hour until his discharge on June 15 at the Blue Mound terminal.

Foster testified that he learned on June 13 from route driver Calvin Worley that Brower had bumped his vehicle against a wall while backing into Vandervoort's Dairy facility in Fort Worth, Texas. On Sunday, June 15, when Brower came to the Blue Mound terminal, Foster asked him whether he had failed to report an accident. Brower replied in the negative. Foster and Brower then went to look at the tank trailer and observed where it had been dented slightly and skinned.[12]

Part VII of Respondent's driver's manual (Resp. Exh. 1) covers the subject of accidents. Paragraph 2, p. 12, (Resp. Exh. 1) instructs drivers as follows:

> Every accident is to be reported to AMPI. Gather all possible information—before leaving the scene of an accident. Failure to report an accident is cause for immediate dismissal.

Foster testified that the above rule has been discussed in safety meetings with drivers and that copies of the manual have been distributed at such meetings and to all new drivers.[13] When Brower persisted in denying responsibility for the bump scratch, Foster in effect suspended him and told Brower he would let him know the outcome the following day. The next morning Foster telephoned attorney Andrew who advised him that Brower be terminated. Foster testified he thereafter fired Brower for not reporting the accident and for failing to fill out an accident report.

Brower testified that on June 15, in the Blue Mound office, Foster told him he had a report that Brower had been engaged in an accident with his truck. Brower denied such. Foster said he had two witnesses that it was true, and that "I'm going to have to fire you." They then went to the trailer and inspected the scratch-dent on the trailer skirt. According to Brower, whom I credit, Foster put his finger on the 10-12 inch scratch and said "There it is right here." Foster pointed to the mark and said, "I'm firing you for doing this." Brower said he did not do it, but even if he had it was nothing to fire him for. He then asked Foster how many people he had ever fired for such a matter. Foster replied, "None. But I'm firing you."

When Brower asked Foster who the two witnesses were, Foster replied, "I don't have to tell you a damn thing. I'll let my lawyers take care of that. You're fired."

At the hearing, Calvin Worley, formerly employed by AMPI (as a route driver), testified on behalf of Respondent that on June 13 at Vandervoort's Dairy he heard a noise, walked out to the dock area, and observed that Brower had the left rear of his tank trailer (at the point of the scratch in issue) up against the wall.

On June 13, Carl Stine was employed by Vandervoort's as a raw milk receiver. On that date he observed Brower back into the unloading hole (a slant-down at the unloading dock). Brower's initial attempt to back in was out of alignment, and on the second attempt Brower hit the building with the left rear of the tank trailer. Stine was called as a witness by Respondent.

Called as a witness for the General Counsel, M. E. Brawley testified that on June 13 he, as garage foreman for Vandervoort's Dairy, was situated across the street and observed Brower back into the "hole" for unloading. Brawley concedes that the left side of the truck was blocked from his field of view and that the vehicle could have hit something and Brawley would not have known it. On the other hand, it seems that Brawley would have noticed if Brower's movement had halted at the entrance to the unloading ramp (hole), for the import of the testimony of Worley and Stine is that Brower got hung up at the entrance post.[14] Indeed, Worley testified that he assisted (apparently by hollering instructions, directions, and observations) Brower in extricating his tanker from its predicament.

I credit Worley and Stine. While I do not discredit Brawley, I note that his view was from across the street whereas Worley and Stine were at the spot. Moreover, Brawley concedes Brower could have made an earlier attempt (and, presumably, bumped into the entrance guard post then). Accordingly, I find that Brower backed into the steel entrance post as described by Worley[15] and Stine.

3. The wage-hour complaint

In the April conversation between Brower and Foster, the latter told Brower of the pay system change and Brower became "mad as a hornet" and told Foster thereafter that he would seek to get the Union in at AMPI.[16]

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[12] Color photographs taken by Brower of the skin marks are in evidence as G.C. Exhs. 2, 3, and 4. Brower described the mark as being a scratch about 10–12 inches long with the right end of the scratch having an indentation as if made with a screwdriver.

[13] Assistant Transportation Manager James McAdams, whose office is in Arlington, Texas, testified that AMPI's policy is that drivers are to report all accidents which result in "any damage." He further testified that a Comanche, Texas, driver (employed in the Dallas-Fort Worth division of AMPI) was fired in March 1980 for failure to file an accident report. McAdams did not describe the nature of the accident. Brower, in fact, testified that he knew AMPI has a rule requiring drivers to report any accident, no matter how small. Indeed, he has filed two accident reports since becoming an employee of AMPI. The first accident occurred on September 4, 1979, in Dallas and involved a similar incident to the event in question here. The estimated amount of damage shown on p. 1 of Resp. Exh. 2 is the amount of $1,500. The second accident occurred December 15, 1979, in Dallas and involved an estimate of no damage to API's truck when a car skidded into it. Respondent's accident review committee charged the first accident against Brower as being "preventable," but found the second accident to be "non-preventable." (G.C. Exhs. 9 and 10.)

[14] The diagram (Resp. Exh. 8) drawn by Stine clearly depicts such fact.

[15] While the fact that Worley volunteered the accident information to Foster suggests a possible bias on his part, no further evidence was adduced, such as that he may have been openly antiunion or that he and Brower were unfriendly, to call for such a finding.

[16] I credit Brower over Foster. I observed Brower to be more sincere and straightforward even though he dated events incorrectly.

It appears that around that time, apparently shortly after the conversation, Brower complained to the Department of Transportation and the wage-hour division of the United States Department of Labor regarding the change in the pay basis from mileage to hourly for the over-the-road drivers. Brower testified he and one other driver signed a formal complaint against Respondent with the wage-hour division.

Called as a witness by Respondent, Roy W. Watkins testified that he has been a compliance officer for the wage-hour division for approximately 14 years. He testified that he began an investigation of wage-hour matters at Respondent's Stephenville, Texas, terminal around January-February 1980. Following completion of a backpay settlement of that investigation around mid-May, Watkins asked Attorney Andrew to look at the Crowley terminal, ascertain whether there were similar violations there, and, if so, to indicate whether he was willing to settle them on the same basis as had been done at Stephenville. Attorney Andrew agreed, and on July 15 he sent Watkins a letter (Resp. Exh. 7) suggesting that Respondent pay overtime compensation to 20 employees. Brower was 1 of the 20, and the figures of $1,865.31 beside his name is nearly double that of the next highest figure of $1,036.89.

On the ground that departmental regulations made such information confidential, Watkins declined to answer questions concerning who had filed a complaint and even whether a formal complaint had been filed regarding the Crowley terminal. Watkins did testify that the first mention of Brower's name between him and Andrew was in Andrew's July 15 letter to Watkins. Moreover, he testified that no letter was sent prior to that time from his office to Attorney Andrew or to Respondent naming Brower in any way.

As already noted, Brower testified he filed a formal complaint with the wage-hour division. There is no record evidence disproving this assertion. Brower, I note, has a tendency to refer to Federal agencies in an indiscriminate manner, and in so doing his testimony becomes rambling and confusing. As an example of this disorderly portion of Brower's testimony, he stated that, on the day Foster fired him, Foster said he had received a letter from the "Wage and Hour and the Labor Board, and that my name was the only name that showed up on it." No such letter was offered in evidence.[17] When then asked to restate the reference to the Board, he stated that such came in when he told Foster he would go to the Board and Foster replied he did not care.

Another apparent inaccuracy is Brower's testimony that a wage-hour division representative told him the agency would have to tell Respondent that Brower was the person filing a complaint against the company. According to Watkins' undisputed testimony, such a disclosure (except through mistake) would be prohibited by departmental regulations.[18]

Despite Brower's disorderly and inaccurate, at times, testimony on the foregoing subject, I find that Brower complained (either orally or in writing) to the wage-hour division following his April conversation with Foster.[19] Although Foster denied (in answer to leading questions) that Brower ever told him he had filed a wage-hour complaint, and asserted that he was unaware of the department's investigation, he conceded on recross-examination that he had heard talk of charges having been filed with the wage-hour division but that "I hadn't been told directly."

4. Analysis and conclusions

Notwithstanding Brower's disorganized and, at times, inaccurate testimony regarding the Federal agencies, I find that he was a more believable witness than Terminal Managers Foster and Smith regarding their conversations. Moreover, Brower's version of these conversations in fact is internally consistent and also consistent with the critical, and undisputed, fact that, around late April 1980, Foster told Brower that the transportation (over-the-road) drivers would switch to an hourly pay basis on May 4. That information converted formerly pro-AMPI Brower into a "mad hornet" who launched a flurry of verbal attacks upon AMPI. Respondent countered by laying Brower off for his protected El Paso remarks, and thereafter discharged him in part for what I find to be an unlawfully motivated reason.

With respect to the unlawful motivation for the discharge, I note that Foster's remark to Brower, in response to how many others he had fired for similar conduct, "None, but I'm firing you," is suggestive of animus. Moreover, the 10–12-inch scratch with indentation obviously constituted far less damage than the "dented tank" (Resp. Exh. 2, p. 2) caused by Brower when he hit a column post and a steel cabinet while backing into a bay at the Oak Farms Dairy in Dallas on September 4, 1979, in an almost identical accident. The $1,500 repair estimate for the Oak Farms accident reflects the fact that the *tank* was dented. In our situation, it was not the tank which was scratched, but the fender skirt—and the scratch, while deeper, just added to the other scrapes appearing on the skirt as shown in the color photographs in evidence.

More significantly, when Brower hit the post at the Oak Farms Dairy in Dallas on September 4, 1979, he was openly favoring AMPI against Local 47. At that time Foster told Brower, "Well, it's no big deal. It happens. Make an accident report, and we'll take care of it."[20] When Brower several months later switched his

[17] In fact, later in his testimony, Brower asserts that Foster had told him on an earlier occasion of receiving a wage-hour letter with Brower's name on it. While I do not overlook the possibility that Foster was jousting with Brower by relying on information he possibly received from his superiors in mid-May, I do not find such to be the case in the absence of any evidence to that effect.

[18] No citation of a specific regulation was given. There is some question whether a published regulation exists in light of 46 Fed. Reg. 7392 (January 23, 1981), wherein the Secretary of Labor proposed a rule governing situations where department employees are subpenaed to testify. Compare Sec. 102.118 of the Board's Rules and Regulations.

[19] Brower's complaint presumably related to the pay system switch. I find it immaterial whether Brower's complaint is related to the subsequent backpay payment he and others received at Crowley-Blue Mound.

[20] Foster did not contradict this evidence when he testified.

support to the Union, Foster gave him the "cold shoulder."

Finally, I note that Foster told Brower just prior to the November 2, 1979, election that he could get rid of anybody, union or not, and that he "would get rid of the agitators when the time comes."[21] This prophetic utterance became more personal to Brower on May 23 when Foster told him, "You talk too much. You agitate." The prophesy, I find, became a fulfilled reality for Brower on June 15 when Foster fired Brower.

Accordingly, I find that the General Counsel established a *prima facie* case that Respondent, as alleged, violated Section 8(a)(3) and (1) of the Act by laying off Donald L. Brower on or about May 23, 1980, until on or about June 11, 1980, and by discharging him on or about June 15, 1980.

Under *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), once the General Counsel has established that an employee's protected activities were a motivating reason for the discharge, the burden shifts to respondent to establish that it would have discharged the employee notwithstanding such protected activities. In this case it appears, and I find, that Respondent carried its burden. This is so even though Crowley Terminal Manager Foster told Brower that the September 1979 $1,500 damage to the tank part of the trailer (where the milk is contained) was "no big deal" when Brower was antiunion, yet 9 months later, with Brower now openly prounion, a scratch on the fender skirt had suddenly become a matter of significance.

Foster testified that he fired Brower for failing to report an accident and failing to submit an accident report. I do not credit such testimony in its import that Brower's union activities were not one reason for the discharge. On the other hand, in the absence of disparity evidence, and in light of Brower's own testimony that any accident, no matter how small, is to be reported, I conclude that one reason for the discharge was Brower's failure to report the incident. Thus, I deem this to be a "mixed motive" case rather than a case of discharge on a "pretext" (i.e., this is not a case where the reason advanced is not at all why the employee was discharged but in fact is seized upon only as a pretext) under the *Wright Line* guidelines. The General Counsel offered no evidence of disparity regarding application of the requirement to report all accidents, and I cannot say that discharge for violating the reporting rule is so grossly disproportionate in relation to the need to maintain the integrity of the rule as to indicate that such discipline would have been lesser, or not imposed at all, in other circumstances.

It must be remembered that Brower did in fact file a report regarding the September 1979 accident. Clearly the integrity of the accident reporting rule is of supreme importance to Respondent. If failures to report seemingly insignificant accidents are sanctioned, drivers may get to the point of not reporting an event resulting in a suit for big damages. Early knowledge is important for notifying the insurance carrier, interviewing witnesses, and the like. Aside from potential damage claims, good customer relations (where a customer's property is damaged) is another obvious reason Respondent would seek to maintain the integrity of its rule.[22]

In light of the foregoing, I shall dismiss the complaint with respect to Donald L. Brower.

C. *L. D. McDaniel's Discharge*

As earlier noted, the General Counsel alleges that Respondent discharged L. D. McDaniel on or about September 30, 1980, because of his activities on behalf of the Union and because he testified under the Act before Administrative Law Judge Anderson. McDaniel, a route driver, had been employed by AMPI for nearly 12 years at the time of his discharge.

Crowley-Blue Mound Transportation Supervisor J. D. Foster testified that he discharged McDaniel, and fellow driver Forrest Cottrell, on September 30 for fighting on the job 9 days earlier at Super Brand Dairy.[23] That McDaniel and Cottrell engaged in a brief fist fight on such occasion is undisputed.[24] Cottrell did not testify. McDaniel, who had never even been reprimanded previously, testified that he would have expected to have been discharged had he been the aggressor, but that he should not have been discharged since he acted in self-defense. I largely credit McDaniel, on the basis of his credible testimony, regarding the nature of the fight, although I find that in the fight he dealt Cottrell a glancing blow on the hip with a wrench.

There is no other record evidence of a fight between employees on the job.[25] Although Foster testified that AMPI has no written rule prohibiting fighting, he has told the drivers at safety meetings that they will be discharged if they get in a fight on company time. Foster further testified that he is unaware of any fights by Crowley employees since he has been manager, and, therefore, he has not discharged anyone else for fighting. James McAdams, assistant transportation manager from AMPI's Arlington office, testified that he attended most

[21] Brower was speaking to Foster about the union activities of L. D. McDaniel (an alleged discriminatee herein) and Dean Cinnamon.

[22] Although Respondent has not cited these examples as some of the reasons for its rule, I cannot overlook the fact that the record compels a finding that Respondent expects the rule to be followed strictly. Commonsense supplies the above examples of why Respondent would want to maintain the integrity of its rule.

[23] The complaint makes no allegation regarding Cottrell, such as on a theory that Cottrell was discharged in order to give an air of legitimacy to McDaniel's discharge. Driver Cottrell had been employed by AMPI less than 1 year.

[24] Cottrell, scheduled to unload ahead of McDaniel, was late in arriving. Consequently, McDaniel proceeded to unload upon the suggestion of the dairy's attendant. On arriving during McDaniel's unloading, Cottrell became upset. He first angrily asked McDaniel why he was unloading first. The second time he approached McDaniel a fight ensued. McDaniel testified he thought he was about to be attacked when Cottrell approached him a second time. McDaniel pushed Cottrell back and, in the ensuing fight, each hit the other in the mouth. A witness, driver Dean Cinnamon, testified that McDaniel hit Cottrell a glancing blow on the hip with a large wrench. The fighters wore down quickly, and the fight ended. Foster testified he learned about the fight from another driver a few days after it occurred. McDaniel and Cottrell were suspended while Foster investigated the matter.

[25] There is a sketchy hearsay reference to driver Don Webber having a fight with a dairyman about 10 years previously. Whatever the actual facts regarding Webber's altercation, it predated Foster's becoming manager of the Crowley terminal in August 1975.

of the safety meetings held at Crowley, but that he did not recall any reference to fighting at such meetings.[26]

During the rebuttal stage, Donald L. Brower was permitted to testify, subject to a motion to strike, that before the election he (being antiunion at the time) did not like McDaniel (a prounion driver) and was going to whip him at the first opportunity. Foster replied that he wished Brower would do so, but:

> Well, when you whip him, make sure that I don't see it because I'll have to fire you if I see it. If I don't see it then I won't have to do nothing about it.

I sustained Respondent's objection and motion to strike the foregoing on the basis that such evidence could have been offered during the General Counsel's case-in-chief and therefore was not proper rebuttal.[27] It is clear that such evidence, if admitted and credited,[28] would have constituted strong support for McDaniel's case since it reflects (1) animus toward McDaniel; (2) a willingness to condone, and even encourage, fighting so long as it is directed toward beating of a union supporter; and (3) only fighting personally observed by Foster would subject the fighters to the penalty of discharge.

In the absence of disparity evidence, or testimony such as that excluded during rebuttal, I am compelled to conclude that the General Counsel has failed to establish a *prima facie* case that Respondent violated Section 8(a)(1), (3), and (4) by discharging McDaniel on September 30, 1980. Accordingly, I shall dismiss that portion of the complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not committed any of the unfair labor practices alleged in the consolidated complaint.

[Recommended Order for dismissal omitted from publication.]

[26] Sequestration having been invoked by the parties, McAdams was not present during Foster's testimony.

[27] *Acute Systems, Ltd. d/b/a McDonald's*, 214 NLRB 879, 881 (1974).

[28] In general, I previously have credited Brower's testimony.